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No. 99-1174

IN THE

Supreme Court of the United States

HOLLIS EARL ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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1. The United States does not deny the importance of the first question presented by this case. Nor could it. Since the petition was filed, the government itself has urged this Court to clarify the bounds of the nondelegation doctrine, as it grudgingly notes in a footnote at the end of its argument on that issue. *See* Opp. at 14. n.11 (discussing the government's pending petition in *Browner* v. *American Trucking Assn's*, No. 99-1257 (filed Jan. 27, 2000) ("*ATA*")). That footnote purports to distinguish this case from *ATA* on the ground that the cases involve "different statutes, different agencies, and different governmental programs," but the distinction is specious. The point is that both cases turn on the *same* legal issue—the limits, if any, imposed by the Constitution under the nondelegation doctrine.

It is on that same legal issue that the United States has sought review in the *ATA* case. Its petition notes that the D.C. Circuit's ruling in that case "raises issues of extraordi-

nary governmental concern," Pet. in No. 99-1257 at 9, including primarily the nondelegation doctrine. It advises the Court that the D.C. Circuit's decision applying that doctrine "opened to constitutional attack * * * numerous other federal statutes containing similarly broad grants of authority to administrative agencies." *Id.* at 16. It cites the same cases in support of its petition that it cites in the opposition here. *Compare id.* at 12 n.5 *with* Opp. at 8. And it has noted a pertinent split in the circuits over application of the nondelegation doctrine. Pet. in No. 99-1257 at 19 n.11. The same circuit conflict, on the same issue of "extraordinary governmental concern," is squarely presented here.

We agree with the government—and with the ever growing number of commentators[1]—that this Court should revisit the nondelegation doctrine. This case presents the nondelegation doctrine in its purest form, because—as the government concedes, Opp. at 10 n.6—the administrative action at issue here was an exercise of unbridled statutory discretion, not limited in any way by applicable regulations. *ATA*, by contrast, involves a circumstance where the agency by regulation has attempted to place limits on the discretion granted by Congress, adding a wrinkle that does not encumber the nondelegation issue here. *See* Pet. at 17-19 & n.9.

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[1] In addition to the commentators cited in the petition, *see* Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. * * * A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."). *See also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium*, 109 Yale L.J. 1399, 1402 (2000) (discussing author's perception of "the emergence of a new delegation doctrine that has the potential to shift the current debate on delegation and democracy").

2. In the face of its own effort to gain review on the nondelegation issue, the United States focuses on attempting to identify reasons why this case—presenting the same issue—does not merit review.[2] That exercise is unavailing.

a. The government does not dispute that the Eighth Circuit's decision in *South Dakota* v. *United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), is directly at odds with the decision below. It is, however, quick to point out—as the petition made clear—that the Eighth Circuit's judgment was vacated by this Court. *See* 519 U.S. 919 (1996). True enough. But it is also true that the reasoning of the Eighth Circuit in *South Dakota* is in direct conflict with the reasoning of the Tenth Circuit below, *see* Pet. at 10-13; that—despite the government's intimations to the contrary, Opp. at 7 n.4—the vacatur was based on the adoption of new regulations designed to avoid the constitutional issue, *see* Pet. at 12; and that neither those regulations nor any other regulations purported to cabin the Secretary's acquisition of the property at issue here. Thus, it is plain that this case would have come out differently under the rationale applied by the Eighth Circuit in *South Dakota*.

The fundamental jurisprudential divide embodied in the Eighth Circuit's decision in *South Dakota* and the Tenth Circuit's decision in this case—expressly rejecting *South Dakota*—introduces great uncertainty over the constitutionality of Section 465 and exacerbates the widespread conflict

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[2] One such attempt is the government's sheepish suggestion that "there is reason to question" whether the nondelegation issue may be raised in this context. Opp. at 6 n.3. The government, however, did not identify for the courts below any such "reason to question" petitioner's ability to raise that issue, and should not be heard to do so now. In any event, the fact that a quiet title action with respect to Indian trust lands might be barred by 28 U.S.C. § 2409a does not provide "reason to question" the ability of a defendant to challenge the *jurisdictional basis* for his conviction under the Indian Major Crimes Act.

and confusion over the nondelegation doctrine.[3] No salutary purpose would be served—certainly the government offers none—by permitting such uncertainty to persist.

b. The United States also contends that certiorari is not warranted because the congressional directive at issue here "is accompanied by ample statutory guidance for the Secretary's exercise of his discretion." Opp. at 12. Nonsense. There is *no* statutory guidance in Section 465—which permits the purchase of lands by the Secretary, "in his discretion" and "for Indians."[4] If such an unbridled grant of authority constitutes "ample statutory guidance," then the nondelegation doctrine is indeed dead. But this Court has repeatedly observed that the doctrine is a core constitutional principle, "rooted in the principle of separation of powers that underlies our tripartite system of government." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). *See* Pet. at 9. In light of the bald statutory language at issue here, this case presents an ideal opportunity to reaffirm that core principle, which is now shrouded in doubt due to the conflict and

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[3] "Even if a decision is vacated, * * * the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes." *Finburg* v. *Sullivan*, 658 F.2d 93, 100 n.14 (3d Cir. 1980). *See also* Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 93 (1955) ("If the opinion below is officially reported, it will always remain in the volume; even if the decision is vacated, the force of the reasoning remains.").

[4] As noted in the petition (pp. 13-14), the Eleventh Circuit has joined the Eighth in recognizing that the statute "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate." *Florida Dep't of Bus. Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The United States attempts to dismiss this statement, *see* Opp. at 13-15, but it is undeniable that the Eleventh Circuit's conclusion that the statute provides no guidance for the Secretary's discretion is squarely in conflict with the view of the Tenth Circuit below that "the statute itself" provides the necessary guidance to the Secretary. Pet. App. 18a n.8.

confusion in the lower courts. If, on the other hand, the government is correct, then the nondelegation principle should at least receive a public burial by this Court. Allowing the doctrine to flounder in the lower courts would only further unsettled this bedrock area of law.

c. The United States in any event does not seriously contend that the "statute itself" provides the necessary guidance, but instead searches far and wide in its effort to identify pertinent limits on the unbridled statutory grant of power. It contends that such guidance is found in "the purposes of the Act as a whole, its factual background, and the statutory context." Opp. at 9. Thus, the government tells us, the statute permits the Secretary to acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base." *Id.* at 10.

These "limitations," however, are found nowhere in the statute itself. It is not at all clear, therefore, whether exercises of this authority outside the "boundaries" the government suggests would violate the statute where the only statutory limitation is one of unguided "discretion" to acquire land "for Indians." *See Florida Dep't of Bus. Regulation*, 768 F.2d at 1256 (Indian Reorganization Act "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate"). Any challenge to such exercises of authority would no doubt be defended by the government as fully authorized by the broad terms of the statute, with no acknowledgement of its facile claim here that there are discernible boundaries to the statutory authority.

Even on their own terms, the limitations suggested by the government do not provide the intelligible principles necessary to avoid a nondelegation problem. A requirement that an acquisition "advanc[e] tribal economic development," Opp. at 10, certainly offers no boundary on the broad statu-

tory discretion, for any acquisition of land "for Indians" could no doubt be justified on the theory that it would "advanc[e] tribal economic development"—including the hypothetical acquisitions discussed by the Eighth Circuit in *South Dakota*. *See* Pet. at 11.[5] At the end of the day, the government's submission does not so much identify guidance for the exercise of discretion as stand for the proposition that the nondelegation doctrine itself is no impediment to the exercise of such unbridled discretion. It is that conclusion—shared by the Tenth Circuit below but rejected by the Eighth Circuit—that this Court should review.

3. The United States also does not dispute the importance of the second question presented by the petition, a matter of touchstone jurisdictional significance for myriad properties across the United States and activities taking place on them. *See* Pet. at 28-29. Instead, as it does with respect to the nondelegation issue, the government devotes its efforts largely to arguing the merits and trying to distinguish away contrary precedents. Here again, however, its efforts fail.

a. Whatever is true of the Tenth Circuit decision in this case, it is *not*—as the government asserts (Opp. at 15)—"consistent with" *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). In *Venetie* this Court reaffirmed that "Indian country exists * * * *only if* the land in question" fits into one of the "three different categories" codified in Section 1151. *Id.* at 527 n.2, 530 (emphasis

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[5] The government's discussion of the Secretary's self-imposed limitations on the exercise of discretion—in the form of regulations—is simply beside the point. Opp. at 10-11. No such regulations existed when the property at issue here was acquired in 1976 by an Area Director of the Bureau of Indian Affairs. As we noted in the petition, moreover, the existence of regulations does not answer the nondelegation problem. *See* Pet. at 19 n.9. The government does not respond to that point.

added). As we explained in our petition (pp. 24-25)—and the United States does not dispute—"'[t]he government has *never* argued that the [building complex in this case] is part of a reservation, dependent Indian community or allotment,'" *id.* at 23 (quoting government; emphasis added); and, in holding that this property is Indian country, the Tenth Circuit below felt no need "to affix" any "categorical label" to it in accordance with Section 1151. Pet. App. 11a. This seat-of-the-pants approach to the Indian country determination flies in the face of *Venetie*, not to mention Section 1151.

The United States nevertheless argues that the Tenth Circuit correctly held that the building complex in this case is "'Indian country,' within the meaning of Section 1151," because it meets the federal set-aside and superintendence requirements applied in *Venetie*. Opp. at 15-16. The *Venetie* Court did apply these requirements in determining whether the land in that case fit within Section 1151(b). *See* 522 U.S. at 532-534. But it never suggested that these requirements governed the Indian country determination—without regard to whether the property at issue fits within Section 1151's terms. To the contrary, the *Venetie* Court began with the text of Section 1151, *id.* at 526-527, then explained that it was intended to codify "the three different categories of Indian country mentioned in our prior cases." *Id.* at 530. As is clear from the Court's discussion of those cases, in enacting Section 1151 Congress did not intend to codify the type of property at issue here, which does not remotely resemble the Indian reservations, dependent Indian communities, or allotments dealt with in prior cases. *See* Pet. at 24-25.[6]

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[6] Petitioner has explained at length why the building complex in this case fails both the federal set-aside and superintendence requirements. *See* Mem. of Law in Support of Mot. to Vacate Conviction for Lack of Federal Jurisdiction Pursuant to 28 U.S.C. § 2255, at 48-91. But to be clear, even if the property met those requirements in the abstract, it would not be Indian country *unless* it fit within Section 1151's terms.

Confining Indian country to its congressionally intended—and textually plausible—reach accords with the jurisdictional significance of Indian country status. As the United States acknowledges, Indian country is "subject to the primary criminal jurisdiction of the United States and the Tribe, rather than the State." Opp. at 18 n.14; *see* Pet. at 20-21. And, as this Court admonished in *Venetie*, "[w]hether the concept of Indian country should be modified is a question entirely for Congress," not the courts. 522 U.S. at 534.

b. The United States suggests that the Tenth Circuit "decision is in accord with several decisions of this Court holding or assuming that tribal trust lands were Indian country although they were not part of a formal reservation." Opp. at 17. As we have explained (Pet. at 25-27), however, none of these pre-*Venetie* cases squarely addresses the Indian country question presented here and, if anything, they simply add to the confusion shrouding this issue. In any event, *United States* v. *John*, 437 U.S. 634, 649 (1978) and *United States* v. *McGowan*, 302 U.S. 535 (1938) are plainly distinguishable; the trust lands in those cases qualified as Indian country under Section 1151(a) and (b), respectively. *See* Pet. at 25. *Oklahoma Tax Commission* v. *Sac & Fox Nation*, 508 U.S. 114 (1993), is to the same effect. There, the Court remanded so that it could be "determined whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities." *Id.* at 126. *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), is distinguishable and does not discuss—let alone purport to decide—the question here. *See* Pet. at 26 & n.15. At most, the Court there held that the tribal trust land in *Potawatomi* "qualifies as a reservation for *tribal immunity purposes*." *Id.* at 511 (emphasis added).

c. The United States says that "[t]he courts of appeals have consistently rejected claims that trust land that is not

part of a formal reservation is not Indian country." Opp. at 18. But—as the Tenth Circuit itself recognized below, Pet. App. 8a n.3—the Eighth Circuit has held that "tribal trust land beyond the boundaries of a reservation [acquired pursuant to Section 465] is ordinarily *not* Indian country." *United States* v. *Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir. 1997) (emphasis added), *cert. denied*, 522 U.S. 841 (1997); Pet. at 21-22. This was not a "passing" thought, Opp. at 19, but rather was central to the Eighth Circuit's resolution of the Indian country issue in *Stands*. While the property at issue in *Stands* was tribal trust land, the Eighth Circuit emphasized that it would not qualify as Indian country *unless* the evidence showed that it was an allotment within the meaning of Section 1151(c), as the prosecution alleged in that case. *See* 105 F.3d at 1573-74. In the Tenth Circuit, by contrast, tribal trust land may qualify as Indian country *regardless* of whether it fits into any particular category of Section 1151.[7]

d. Finally, any question of the significance and potentially far-reaching effect of the decision below is answered by *H.R.I., Inc.* v. *Environmental Protection Agency*, 198 F.3d 1224 (10th Cir. 2000). There, the Tenth Circuit—specifically relying on the decision in this case and engaging in the same *ultra vires* approach to the Indian country

[7] None of the prior Eighth Circuit decisions cited by the United States (Opp. at 19) eliminate the conflict between *Stands* and the Tenth Circuit decision in this case. *United States* v. *Azure*, 801 F.2d 336 (8th Cir. 1986)—which the Eighth Circuit addressed in *Stands*, *see* 105 F.3d at 1572 n.3—simply establishes that tribal trust land is Indian country when it fits into one of the categories established by Section 1151. *See* Pet. at 21-22 n.11. We agree. The same goes for *United States* v. *Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991), *cert. denied*, 502 U.S. 1109 (1992) and *United States* v. *South Dakota*, 665 F.2d 837, 840-843 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), which involved Indian housing communities determined to be dependent Indian communities within Section 1151(b). *See also United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991) (concluding that land in question fit within Section 1151(b)), *cert. denied*, 500 U.S. 941 (1999), cited at Opp. at 18.

same *ultra vires* approach to the Indian country determination—held that tribal trust land qualified as Indian country within Section 1151(a), even though it was part of a *disestablished* Indian reservation. *Id.* at 1249-54. In so holding, the court of appeals emphasized that, under its decision in this case, "informal reservations" continue to exist under Section 1151(a), apart from whether land qualifies as a dependent Indian community under Section 1151(b). *See id.* at 1250, 1252. This ruling also directly contravenes *Venetie*, *see* Pet. at 23-24, and, coupled with the decision below, is destined to create even more conflict and confusion on this touchstone jurisdictional issue.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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